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ROBIN GANSLEY MITCHELL; ARTHUR J. BENVENISTE; WALTER J. BORDEN; CONRAD J. CHAVEZ; LOUIS SEIVERDING CORTEZ; SCOTT D. EVANS; ELIZABETH S. FORSBERG; HAROLD A. GIANCANELLI; VERA E. LEVEQUE; JOYCE A. MACKIE; BRUCE J. MACKIE; JOYCE MCCANN; ANN M. NORTON; JOHN W. NORTON; JANET L. ROTHENBERG; CHERYL SHAPIRO; RALPH J. STAM; ALICE C. TURNER; and ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

UNITED TEACHERS-LOS ANGELES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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ARGUMENT

I. CONTRARY TO THE UNION'S SUGGESTION, THE PRESENTED QUESTION, INVOLVING THE GOVERNMENT'S SEIZURE OF MONIES FOR POLITICAL AND IDEOLOGICAL CAUSES FROM A CLASS OF SILENT NONMEMBER TEACHERS, HAS NEVER BEEN PRESENTED TO THIS COURT.

In the Brief in Opposition ("Opp.") at 5-11, Respondent United Teachers-Los Angeles ("UTLA") contends this Court previously adjudicated the issue presented in the Petition adversely to the Petitioners and the class of silent nonmembers. UTLA claims this Court has "predicated any grant of relief, or even recognition of a viable employee claim thereto, upon the voicing of an affirmative objection to such use by that employee." Opp. at 5. This representation is spurious.

The narrow question raised here has never been presented to this Court because, unlike Petitioners, none of the *nonmember* employees involved in the "long line of Supreme Court union security and agency shop cases" has ever challenged the "requirement" that he or she object to the payment of the unions' political, ideological, and other nonbargaining expenses as a condition of preventing the automatic seizure of those monies from his or her wages. *E.g.*, Brief for Respondents at 6-7, *Railway Clerks v. Allen*, 373 U.S. 113 (1963) (No. [62-]316).

Indeed, the nonmembers in the prior cases had made their objections known to the unions in one way or another. *Lehnert v. Ferris Faculty Ass'n*, ___ U.S. ___, ___, 111 S. Ct. 1950, 1956 (1991); *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 297 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 439 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 212-14 (1977); *Railway Clerks v. Allen*, 373 U.S. 113, 118-19 & n.6 (1963); and *Machinists v. Street*, 367 U.S. 740, 744 (1961). Thus, the critical issue presented here has not been directly or intentionally decided in any of the earlier cases.

II. *HUDSON* DOES NOT SUPPORT THE VIEW THAT THE STATE CONSTITUTIONALLY MAY AID PRIVATE LABOR ORGANIZATIONS BY SEIZING THE FUNDS OF SILENT NONMEMBER EMPLOYEES FOR THE UNIONS' POLITICAL AND IDEOLOGICAL ACTIVITIES.

Unlike the Ninth Circuit, which did not address the district court's reliance on this Court's decision in *Hudson*, UTLA (Opp. at 10-11 n.4) claims that *Hudson* supports the Ninth Circuit's reversal of the district court's injunction against the government's automatic seizure of nonmembers' wages for the unions' political and ideological agenda. UTLA suggests that because *Hudson*, 475 U.S. at 306 & n.16, cites *Street*, 367 U.S. at 774, for the proposition that "dissent is not to be presumed," this Court validated the proposition that "the state could constitutionally authorize the union to collect full dues" from silent nonmembers. Opp. at 8, quoting Pet., App. A at 6a.[1] UTLA's reliance is misplaced.

UTLA wants to interpret this Court's use of "dissent" without considering the different factual context in which *Hudson* used it. This cannot be done.[2] In *Street* this Court

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[1] The Ninth Circuit and UTLA ignore the nature of the state's involvement in the constitutional infringement of enforcing the agency shop by discussing "the nonmembers['] ... obligation to **pay** an agency fee," Pet., App. A. at 2a (emphasis added), and "payroll deductions." *Id.* at 3a. In fact, the district court properly recognized that the school district affirmatively facilitates the constitutional infringement by involuntarily seizing agency fees from the pay of all nonmember teachers without their authorization and automatically deducts monies for political and ideological purposes from the silent teachers. Pet., App. C at 19a-20a.

[2] *See Lassiter v. Department of Social Services*, 452 U.S. 18, 24-25 (1981) (application of the due process clause requires consideration of several interests at stake in a particular situation); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) ("[T]he question remains what process is due" in a particular context), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

mandated that an employee's "dissent" from initially paying full dues and supporting all union activities, including its political and other nonbargaining activities, was "not to be presumed"—where the employees at issue were union members. However, that same conclusion cannot be reached from an examination of the language and facts of *Hudson*.

In *Hudson*, there was no need for nonmembers to "dissent" within the meaning of *Street*, 367 U.S. at 774, since the statute at issue only authorized the exaction of the employee's "proportionate share of the cost of the collective bargaining process and contract administration," not full union dues. *Hudson*, 475 U.S. at 295 & n.1, quoting Ill. Rev. Stat., ch. 122, ¶ 10-22.40a (1983). Unlike the collective bargaining agreement in *Street*, which authorized the employer to require the payment of full union dues, the collective bargaining agreement in *Hudson* only authorized the public employer to seize from the nonmembers a fee equal to the employees' *pro rata* share of the union's costs of collective bargaining, contract administration, and grievance adjustment, which the union initially calculated as 95% of full union dues. 475 U.S. at 295-96. Thus, a requirement for objection to the exaction of full union dues, including monies for political and ideological purposes, was not and could not have been adjudicated in *Hudson*, because this Court was presented with facts,[3] a statute, and a collective bargaining agreement

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[3] Under the union's procedure in *Hudson*, the only objection mentioned was an objection to the calculation of the "proportionate share" deduction.

> For the 1982-1983 school year, the Union determined that the "proportionate share" assessed on nonmembers was 95% of union dues. At that time, the union dues were $17.35 per month for teachers . . . ; the corresponding deduction from the nonmembers' checks thus amounted to $16.48 . . . .
>
> . . .
>
> The Union also established a procedure for considering objections by nonmembers. . . . After the deduction was made, a nonmember could object to the "proportionate share" figure by

which did **not** authorize the exaction of full union dues/fees from nonunion employees.

In establishing the notice and procedural guarantees necessary under the First and Fourteenth Amendments for the constitutional collection of agency fees, this Court in *Hudson*, 475 U.S. at 306, 320, referenced the "dissent" of *Street* and the nonmember's obligation to raise an "objection" in the quite rational context of triggering a **challenge** to the union's calculation of the reduced fee. Since the Court was requiring, for the first time, that labor organizations provide the opportunity to challenge the amount of the reduced fee before an impartial decisionmaker, *Hudson*, 475 U.S. at 307 & n.19, it is hardly surprising that this Court required nonmembers, like all litigants, to take affirmative steps to invoke that quasi-adjudicative process. Moreover, any question of whether the nonmembers in that case had to "dissent" to avoid liability for full union dues would have been pure *dicta*, unjustified by any facts or law necessary to resolve the issues of the case. Thus, the district court, not the Ninth Circuit and the unions, correctly understood the context in which the *Street* "burden" to raise an objection is stated in *Hudson*.[4] *See* Pet., App. C at 22a.

> writing to the Union President . . . . The objection then would meet a three-stage procedure. . . . If an objection was sustained at any stage of the procedure, the remedy would be an immediate reduction in the amount of future deductions for all nonmembers and a rebate for the objector.

475 U.S. at 295-96.

[4] Nevertheless, Petitioners do not contend that *Hudson* has adjudicated this question. *See* § I, *supra*, at 1. Instead, while the decision in *Hudson* does not finally dispose of this question but merely lends support to Petitioners' argument, its language certainly does not support the proposition that *Hudson* validated the position taken by the Ninth Circuit and the Respondent.

III. THE IMPORTANT DISTINCTION BETWEEN UNION MEMBERS AND NONMEMBERS DETERMINES WHICH EMPLOYEES MAY BE REQUIRED TO AFFIRMATIVELY VOICE THEIR OBJECTIONS TO THE UNIONS' POLITICAL, IDEOLOGICAL, AND OTHER NONBARGAINING EXPENDITURES.

The question of first impression presented in this case is whether a **nonmember's** "dissent is not to be presumed." *Street*, 367 U.S. at 774. Petitioners concede—as *Street* requires—it is perfectly rational that a union **member's** dissent to the collection and expenditure of monies for political, ideological, and other nonbargaining activities should not be presumed. After all, a union member takes affirmative steps to affiliate himself or herself with a labor organization.[5] Thus, when presented with litigants who were union members seeking broad relief from union coercion, and with the question of the appropriate extent of the relief to be granted, where an employee has assumed the mantle of union membership, this Court correctly required a showing that to be entitled to relief such members had to "affirmatively ... ma[k]e known" their objection to the union. 367 U.S. at 774.

Then, in both *Abood*, 431 U.S. at 213 n.2, and *Ellis*, 466 U.S. at 438 n.2, this Court was presented with a mixed group of employees, including both members of the union who objected to supporting the union's political and ideological activities and nonmembers who also objected **but did not contest the "objection requirement."** Accordingly, this Court merely repeated its admonition in *Street*, that dissent is not presumed. However,

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[5] It is clear that "there are good reasons for employees to join the union which represents their bargaining unit." Rossie Alston, *Union Discipline and Employee Rights*, 7 Lincoln Rev. 41, 44 (1986); *see also* Gary Chaison and Dileep Dhavale, *The Choice Between Union Membership and Free-Rider Status*, 13 J. Lab. Res. 355, 360-63 (1992) (identifying three factors which may "increase the relative attractiveness of union membership" in a Right–to–Work state).

contrary to the wishes of the Respondent and the Ninth Circuit, *see* Opp. at 10-11, this Court's failure to limit its "objection requirement" to union members in those cases is not preclusive to Petitioners who **now** contest that their "dissent is not to be presumed" and any requirement that **nonmembers** must object.

IV. APPLICATION OF THIS COURT'S ANALYSIS IN *WOOLEY* REQUIRES REVERSAL OF THE NINTH CIRCUIT'S DECISION.

UTLA's reliance, Opp. at 8-9, upon this Court's decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), is sorely misplaced.[6] *Wooley* found the imposition of criminal sanctions for obscuring a state's motto on license plates issued and placed upon private automobiles to be repugnant to the First Amendment. This Court applied a two-pronged analysis in reaching its conclusion. First, the individuals' interests must implicate First Amendment protections. Second, "the State's countervailing interest [must be] sufficiently compelling to justify" the First Amendment infringement. *Id.* at 716-17. In *Wooley*, the State's countervailing interest was found wanting. *Id.*

Likewise, there is neither a sufficiently compelling countervailing government interest, nor any rational justification, to support the proposition that public school districts may compel employees who are nonmembers of a labor organization and make no response to a union mailing to financially support the union's political and nonbargaining activities. Neither the Ninth Circuit nor UTLA identifies, nor could they, any such governmental interest. Thus, the *Wooley* two-pronged analysis supports the district court's injunction, not the Ninth Circuit's reversal.

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[6] *Wooley* is also irrelevant to the question presented here because, as in the previous agency shop cases, those who remained silent did not seek any protection from the proposition that "dissent is not presumed." Likewise, Professor Tribe's comments about *Wooley* are irrelevant.

Furthermore, the analysis of UTLA and the Ninth Circuit is precisely the reverse of the appropriate First Amendment analysis. In arguing that this Court's decisions limit "the [r]ight to [p]ay a [r]educed [a]gency [f]ee to those [n]onmembers who [a]ffirmatively [o]bject to [p]aying the [f]ull [f]ee," Opp. at 5, UTLA wrongly suggests that the nonmember's right to be free from compelled speech—the right to refrain from political speech and association, *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)—does not survive the imposition of an agency fee requirement. Under this Court's First and Fourteenth Amendment jurisprudence, a nonmember's pre-existing right to refrain from supporting a labor organization's political, ideological, and nonbargaining activities cannot be burdened by requiring the nonmember to affirmatively object to supporting the union's political and ideological activities, **especially since the nonmember has already refrained from or refused to support *any* of the labor organization's activities.** The First Amendment does not allow mere government fiat to countenance burdening the exercise of the right to be free from compelled association—even to the extent of requiring nonmembers to voice an objection!

The source for the argument that labor organizations should be permitted to presume the support of nonmembers for their political, ideological, and nonbargaining agenda is self-evident, and cannot be cloaked in any mantle of neutral principles. The only rational reason why state and local officials would provide for such a presumption, instead of affirmative consent, is that government ***prefers*** the political and ideological speech of labor organizations, contrary to the restrictions on government power imposed by the First and Fourteenth Amendments. *See R.A.V. v. City of St. Paul*, ___ U.S. ___, ___, 112 S. Ct. 2538, 2547 (1992); Petition at 12, 16-17 & n.12, 25-26.[7]

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[7] It is most revealing that UTLA also failed to discuss *R.A.V.* and the abuse of governmental power in automatically seizing monies from its employees to support the unions' political and ideological agenda.

CONCLUSION

The petition should be granted as to the question presented.

Respectfully submitted,

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